IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

Case No.: 12012447-CI-011

vs.

HEATHER CLEM; GAWKER MEDIA, LLC aka GAWKER MEDIA; et al.,

Defendants.
_____/

MOTION TO OVERRULE OBJECTIONS TO THIRD-PARTY SUBPOENAS AND OPPOSITION TO MOTIONS FOR PROTECTIVE ORDERS

Pursuant to Florida Rules of Civil Procedure 1.351, 1.410, and 1.280(c), Defendant Gawker Media, LLC ("Gawker") respectfully moves this Court for an Order (1) overruling the objections plaintiff Terry Bollea filed in response to Gawker's notices of intent to serve subpoenas, (2) granting Gawker's motions for commissions and letters rogatory, and (3) denying the motions for protective order Bollea filed in response to each of the requested third-party subpoenas.

BACKGROUND

1. Bollea began his litigation against Gawker seeking more than $100 million in damages. He pursues these damages based on his claims that (a) he suffered "general emotional distress" and (b) he is entitled to the "reasonable value of a publicly released sex tape featuring Hulk Hogan." Ex. 1 (Bollea's Third Supplemental Response to Interrogatory No. 12). To defend itself against these claims and to test Bollea's damages theories, Gawker needs to take discovery of facts bearing on those alleged damages and his causes of action more generally. To that end, Gawker seeks to serve document subpoenas on third-party witnesses that Bollea

identified during his deposition. Specifically, on July 7 and 8, 2014, Gawker filed notices of intent to serve subpoenas on, and motions seeking letters rogatory and/or commissions for subpoenas directed to, key witnesses concerning plaintiff's claims and his damages. These include his agents, his wrestling organizations, and his business partners. Specifically, they include the following witnesses:

- Bollea's Agents – Peter Young, who has been plaintiff's agent for 35 years, handling "TV or film stuff" and other media like "video game[s]," Ex. 2 (Bollea Deposition Transcript) at 69:5-10, 70:21-25 (hereinafter "Bollea Dep."),[1] and Darren Prince and his agency Prince Marketing Group, which serve as Bollea's sports agent and handle "one-offs like autograph signings [and] the Super Bowl commercial," *id.* at 70:13-20; Exs. 3, 4, 5 (subpoenas to Young, Prince Marketing, and Prince).

- Principals in Hogan's Beach Restaurant – Ben Mallah, who is plaintiff's partner in the restaurant bearing the Hulk Hogan name and likeness, Bollea Dep. at 163:16 – 164:4, and Bay Harbor Hotel and Convention Center, LLC, the company that owns and operates the restaurant, which opened shortly after the Gawker Story was posted, *see, e.g.*, Ex. 6 (Deposition Exhibit 79); Exs. 7, 8 (subpoenas to Mallah and Bay Harbor).

- Key Contacts for Hostamania, The Web Hosting Service Featuring Plaintiff – Tech Assets, which owns Hostamania, and Marc Hardgrove, the person who

[1] Without conceding that plaintiff has properly designated the relevant portions of his deposition testimony as confidential, Gawker is nonetheless complying with those designations here in accordance with this Court's Confidentiality Order. Accordingly, Gawker has redacted those portions of Exhibit 2 that (a) have been designated as confidential, and (b) are not being relied on for purposes of this motion. Those portions of plaintiff's testimony that have been designated as confidential and are being relied on in this motion have been collected separately in Exhibit 19, which is being filed under seal.

approached Bollea about using the Hulk Hogan name and likeness in connection with the Hostamania web hosting service shortly after the Gawker Story was posted, *see* Bollea Dep. at 178: 1-8, 14-18; Exs. 9, 10 (subpoenas to Tech Assets and Hardgrove).

- Wrestling Companies – TNA Entertainment, the wrestling company for which Bollea worked at the time the Gawker Story was posted, Bollea Dep. at 141:5-9, and World Wrestling Entertainment, Inc. ("WWE"), the superior wrestling company that courted Bollea to work for it after the Gawker Story was published, *id.* at 143:10-20 (contrasting WWE and TNA, explaining that "one of them is a wrestling company and one of them is not," and stating that "WWE is the wrestling company"); Exs. 11, 12 (subpoenas to TNA and WWE).

2. Bollea responded to Gawker's notices and motions by filing objections and motions for protective orders. The objections Bollea lodged to each subpoena were identical. Each objection broadly stated that every subpoena "is overbroad, oppressive, and harassing; . . . not reasonably calculated to lead to the discovery of admissible evidence; . . . invades upon Plaintiff's constitutional privacy rights; [and] . . . seeks documents in violation of Judge Campbell's February 26, 2104 protective order, which states that 'inquiry into the . . . financial records . . . of Terry Bollea . . . is hereby prohibited.'" Ex. 13 (Objections and Motions for Protective Orders). The objections did not contain any further explanation and did not specifically object to any individual document request. Bollea offered no additional substantive explanation for seeking protective orders.

3. After Gawker asked Bollea to clarify whether he objected to any specific requests, he wrote a letter listing certain requests and reiterating his general objections to each. *See* Ex. 14 (Letter from C. Harder to M. Berry, dated July 23, 2014, identifying specific requests to which

Bollea objects). The parties then met by telephone to confer about the specific requests and, in the ensuing weeks, engaged in further negotiations.

4. During the course of those discussions, Gawker offered to narrow certain requests. It also provided case law from Florida state and federal courts demonstrating that the other requests sought relevant evidence. The parties agreed to modify some requests to accommodate plaintiff's concerns, and Gawker agreed to withdraw other requests.

5. After the parties conferred further, plaintiff continued to object to certain requests, even as modified. Those requests seek three categories of information:

- Records showing the value of Hulk Hogan videos and Hulk Hogan commercial appearances;
- Records reflecting Hulk Hogan's public image, including how plaintiff seeks to portray himself to the public through advertisements, in media, and in other commercial appearances; and
- Records showing plaintiff's conduct while filming an advertisement in which he swings on a wrecking ball while wearing a thong and showing his bare buttocks, and about which he testified during his deposition in this case.

As is demonstrated below, each category of requests seeks evidence that is relevant to Bollea's damages claims and other aspects of this case. Each request is directed to people and companies identified by Bollea as having relevant roles in his business affairs, and each is narrowly tailored to seek information calculated to lead to the discovery of admissible evidence.[2]

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[2] Plaintiff also objected to some of the deposition topics listed in the motions for letters rogatory and/or commissions seeking subpoenas for testimony by WWE and Prince Marketing. Those objections mirrored the objections to the proposed requests for documents, which cover the same topics. Gawker believes that the deposition topics are appropriate for the same reasons that it believes that the requests for documents are reasonably calculated to discover admissible

ARGUMENT

I. RECORDS RELATING TO THE VALUE OF HULK HOGAN VIDEOS AND COMMERCIAL APPEARANCES ARE RELEVANT AND DISCOVERABLE.

6. Gawker seeks to obtain documents from Bollea's agents, business partners, and employers about the value of Hulk Hogan videos and his other commercial appearances in recent years. Those documents reflect the commercial value of Hulk Hogan's name and likeness, and thus bear on plaintiff's claim for the "reasonable value of a publicly released sex tape featuring Hulk Hogan." Bollea objects to these requests, however, based on a previous ruling by Judge Campbell concerning general requests for Bollea's financial records.[3] That ruling does not foreclose the discovery sought here. Indeed, the ruling was issued *before* Bollea had committed to pursuing any specific theory of damages, and Judge Campbell expressly contemplated that Gawker would be permitted to seek additional discovery relating to plaintiff's damages once he had responded to an interrogatory asking him to articulate his claimed damages. Nevertheless, to the extent the order might be read to restrict discovery into documents bearing on plaintiff's damages, that order should be clarified in light of plaintiff's supplemental interrogatory responses that detail his damages theories and which were served after that ruling. *See* Ex. 1.

A. The Ruling On Financial Records

7. Judge Campbell's ruling addressed document requests that Gawker served early in the case asking Bollea to produce his tax returns, financial statements, loan and mortgage

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evidence. It therefore asks for the objections to the deposition topics to be overruled on the same grounds. *See infra* at ¶¶ 13-36.

[3] Bollea also objects to certain of the requests on the ground that they allegedly seek the private financial information of third parties, but the cases on which he relies are inapposite, as those cases address situations in which the requested "information is not relevant." *Rappaport v. Mercantile Bank*, 17 So. 3d 902, 906 (Fla. 2d DCA 2009) (as quoted in Letter from C. Harder to M. Berry, dated July 23, 2014, attached hereto as Exhibit 14). Here, unlike in those cases, the requested records are relevant. *See infra* at ¶¶ 13-23.

applications, and other information about his personal finances. Bollea objected to this discovery, prompting the parties to litigate the propriety of Gawker's requests. At the hearing on that question, Bollea's counsel explained that plaintiff was "seeking to preclude" discovery of plaintiff's "financial – general finances," complaining that Gawker was seeking "tax records," "loan application and mortgage applications," and "all of his contracts that he's ever signed during the course of many, many years." Ex. 15 (Oct. 29, 2013 Hearing Transcript) at 11:6-11; *see also id.* at 13:21-24 (objecting to requests for "his tax returns, his loan applications, all financial statements of every type, all financial documents of every type").

8. Defendants responded to this argument by contending that the requests sought information that was relevant to allegations plaintiff made in his complaint, including that "Plaintiff's goodwill, commercial value, and brand have been substantially harmed as a result" of the Gawker Story. Am. Compl. ¶ 31; *see also id.* ¶ 33 (alleging that "[t]he commercial value of Plaintiff's name, image, identity and persona has been, and continues to be, substantially diminished by Defendants' actions"). Defendants also noted that plaintiff had not provided a substantive answer to an interrogatory asking him to "tell us what your theories of damages are." Ex. 15 at 28:7-13.

9. Judge Campbell responded by imploring plaintiff that "the time to let [defendants] know [his damages theory] is now. We're doing the discovery now." *Id.* at 14:6-7. Bollea's counsel then explained that, despite the allegations included in his complaint, plaintiff was "not seeking damages to his career." *Id.* at 66:17. Instead, counsel explained, plaintiff is seeking, among other things, the "market value of a sex tape of Hulk Hogan." *Id.* at 15:17-18. During the hearing, there was no discussion of how that "market value" might be assessed, other than the bald assertion by plaintiff's counsel, with no evidentiary support, that "some celebrities – or

some sex – celebrity sex tapes make $10 million, $15 million, $20 million" and his contention that "the value they got is the value of a celebrity sex tape in which Hulk Hogan is the star." *Id.* 67:1-12.

10. Based on plaintiff's representations at the hearing, Judge Campbell sustained his objections concerning "financial records of the plaintiff, tax returns, whoever – the names of the people that prepare his taxes, any of those." *Id.* at 91:24 – 92:1.

11. After Judge Campbell announced her decision, Gawker's counsel sought clarification "so that we can prepare [for trial] and get the information we need, but not overstep the bounds of the Court's ruling." *Id.* at 93:21-23. Judge Campbell responded to that inquiry by noting that "[Gawker] mentioned a number of things today that I think would be fair game for you to know, especially for purposes of trial." *Id.* at 94:1-3. She explained, however, that the representations by Bollea's counsel about his limited claim for damages "significantly eliminated a number of theories of damages," which "eliminate[d] a lot of the areas of inquiry on the – for the defense." *Id.* at 94:6-10. She further told the parties that if plaintiff does not provide relevant documents bearing on his damages then he would "not [be] allowed to bring it up during trial." *Id.* at 94:13-14. Judge Campbell then told plaintiff that it would be "a good idea" to provide a meaningful response to the interrogatory seeking information about his damages theory, and plaintiff promised to provide a supplemental response. *Id.* at 94:23 – 96:12.

12. Following the hearing, the Court entered an order providing that "inquiry into . . . financial records [and] names of tax preparers . . . of Terry Bollea . . . is prohibited, absent further order of the court" and, "consistent with the foregoing ruling," directing plaintiff to respond to an interrogatory "regarding the identity and basis of his damages claims." Ex. 16 (Feb. 26, 2014 Order).

B. Plaintiff's Supplemental Discovery Responses On Damages And Gawker's Subpoenas

13. Plaintiff subsequently served supplemental interrogatory responses explaining his damages theories, supplementing those responses several times, most recently on June 24, 2014. *See* Ex. 1. Those supplemental responses state that plaintiff is seeking damages, *inter alia*, based on "[t]he reasonable value of a publicly released sex tape featuring Hulk Hogan." *Id.*

14. Plaintiff seeks these damages – not just for a sex tape, but a sex tape featuring Hulk Hogan – based on his claim that there is "considerable commercial value in his name, image, identity and persona." Am. Compl. ¶¶ 32, 77. Indeed, he acknowledges the obvious point that the value of the sex tape is informed by the nature and status of his fame and celebrity. *See, e.g.*, *id.* ¶ 25 (noting as a central fact of the case that he is "a professional wrestler, motion picture actor, and television personality who has enjoyed popularity as the character 'Hulk Hogan'").

15. Based on these allegations, and to evaluate plaintiff's "reasonable value" damages theory, Gawker seeks to assess the actual commercial value that the market has placed on Hogan's name, image, identity, and persona. Thus, it seeks information about that commercial value by serving subpoenas on people and companies that have paid plaintiff for endorsing their products, licensing his likeness to them, or appearing on their behalf around the time of the Gawker posting (*e.g.*, WWE, TNA, Hogan's Beach Restaurant, and Hostamania). For example, it seeks to subpoena WWE and TNA for:

- "Documents sufficient to show profits you derived from the sale of Hulk Hogan Videos for the period from January 1, 2012 to the present," Request No. 14 to WWE; Request No. 19 to TNA;[4]

- "Documents sufficient to show the amount paid to Terry Bollea or Hulk Hogan related to the sale of Hulk Hogan Videos for the period from January 1, 2012 to the present," Request No. 15 to WWE; Request No. 20 to TNA; and

- "Documents sufficient to show the economic value to you of a Hulk Hogan Video," Request No. 16 to WWE; Request No. 21 to TNA.

16. Likewise, Gawker seeks to ask the owner of Hogan's Beach Restaurant and the company that owns Hostamania for "[a]ll documents referring or relating to licensing Terry Bollea's or Hulk Hogan's name, likeness, and/or any of his trademarks in connection with the Restaurant" and Hostamania, including "any request or proposal" connected with the licenses. Request No. 6 to Bay Harbor, Ben Mallah, Tech Assets, and Marc Hardgrove.

17. Gawker also is seeking information from plaintiff's agents about advertisements, movies, media appearances, and other endorsements for which he has been paid, or for which people or companies have offered to pay him, in the past few years. For example, it seeks to subpoena plaintiff's agents for:

- "All documents reflecting, referring, or relating to offers or invitations for Terry Bollea or Hulk Hogan to appear at events or in any Media from January 1, 2011 to the present," Request No. 6 to Young, Prince, and Prince Marketing;

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[4] The phrase "Hulk Hogan Videos" is a defined term in the subpoena. *See, e.g.*, WWE Instruction No. 10 (defining term to mean "video recordings in which Terry Bollea or Hulk Hogan is featured, whether disseminated on tapes, DVD or other tangible medium, or via download to computer, tablet, or mobile device").

- "All documents reflecting, referring, or relating to offers or invitations for Terry Bollea or Hulk Hogan to appear in, or for his name or likeness to be used in, advertisements from January 1, 2011 to the present," Request No. 8 to Young, Prince, and Prince Marketing; and

- "All documents reflecting, referring, or relating to pitches or proposals by you for a person or entity to license Terry Bollea's or Hulk Hogan's name or likeness for products or commercial enterprises from January 1, 2011 to the present," Request No. 10 to Young, Prince, and Prince Marketing.[5]

C. Gawker's Subpoenas Seek Relevant Information Pertaining To Plaintiff's Damages

18. Gawker's requests to plaintiff's agents, business partners, and employers are narrowly crafted to seek information that bears directly on his damages theory. Each of the requests is focused on a limited topic and a limited period of time relevant to his claims. Indeed, each of the requests seek precisely the same kind of information that courts in Florida have held is relevant when a plaintiff who claims his image has been misappropriated seeks to recover the reasonable commercial value of that misappropriation.

19. For example, in *Weinstein Design Grp., Inc. v. Fielder*, 884 So. 2d 990, 1002 (Fla. 4th DCA 2004), a famous baseball player filed suit for misappropriation after the defendant used his name in an advertisement. On appeal, the defendant argued that the trial court abused its discretion in refusing to remit the compensatory damages award entered against it. As in this case, the plaintiff sought "the royalty value of [the player's] name for [defendant's] uses." *Id.*

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[5] A complete list of each of the subpoena requests seeking information about the commercial value of Hulk Hogan is attached hereto as Exhibit 17. This list provides the requests as modified by the parties and as further offered by Gawker following significant efforts to address plaintiff's objections.

At trial, the defense introduced, through an expert, the baseball player's tax returns as evidence to show "the most [plaintiff] had ever been paid" for an endorsement and "that uses of his name for endorsements actually yielded an average of $7500 per endorsement." *Id.* Similarly, the defense expert testified about plaintiff's "past endorsement contracts." *Id.* Although the District Court of Appeal held that the issue on damages was moot in light of its ruling that a new trial was required on other grounds, it did not question whether any of the damages evidence should have been admitted at trial, noting that the jury "was free to accept or reject" the parties' expert testimony "as it saw fit." *Id.*

20. Other courts have held that information about the value of authorized commercial uses is relevant in assessing the reasonable value of unauthorized uses – even when the authorized uses are qualitatively different than the unauthorized use. For instance, in *Coton v. Televised Visual X-Ography, Inc.*, 740 F. Supp. 2d 1299 (M.D. Fla. 2010), the plaintiff filed suit against a company that used a photo of her taken when she was 14 years old for the cover of a DVD containing the company's pornographic movie. Like Bollea, the plaintiff in *Coton* testified that "if asked, she would not have allowed" this use. *Id.* at 1303. After the parties engaged in discovery, the defendant defaulted, and the court held a trial to assess damages. Plaintiff, who had asserted claims for copyright infringement and misappropriation, sought as damages for both claims the "loss of a licensing fee." *Id.* at 1311. In support of her damages, plaintiff presented evidence that she receives licensing fees for her photos and submitted evidence of the amount a book publisher paid her to use her photos in vastly different circumstances. *See id.* at 1309. The

court credited that evidence in determining how much money to award the plaintiff for the defendant's unauthorized use in connection with the pornographic movie. *See id.*[6]

21. Similarly, in *Jackson v. Grupo Indus.l Hotelero, S.A.*, 2009 WL 8634834, at *4 (S.D. Fla. April 29, 2009), a famous recording artist filed a misappropriation claim after his image was used in an advertisement. At trial, the artist presented evidence of his endorsement agreements to establish his damages for defendants' unauthorized use. *See id.* One of the artist's witnesses "testified about how he compared the factors present in Plaintiff's various agreements to the factors present in the involuntary 'deal' foisted upon Plaintiff in this case." *Id.* at *11. The court explained that although the endorsements that were the subject of those contracts were not the same as defendants' advertisement, those "agreements do have elements or factors which provide . . . some guidance in arriving at a reasonable license fee here." *Id.* at *4

22. Just as in these cases, information about the commercial value of videos featuring Hulk Hogan and commercial appearances by Hulk Hogan bears on plaintiff's claim for the commercial value of a sex tape featuring Hulk Hogan. Although advertisements, wrestling videos, movies, and television shows are not the same as a sex tape, they provide indicia of the value of plaintiff's appearance in such a tape and "have elements or factors which provide . . . some guidance in arriving at a reasonable license fee here." *Jackson*, 2009 WL 8634834, at *4; *see also Coton*, 740 F. Supp. 2d at 1311 (using licensing fee plaintiff received for publishing photographs in connection with a book in calculating license fee for unauthorized use in connection with pornographic movie).

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[6] Ultimately, the court awarded plaintiff her lost licensing fee as copyright damages and declined to award any misappropriation award, noting that such an award would have been duplicative. *See Coton*, 740 F. Supp. 2d at 1311.

23. Now that plaintiff has articulated his theory of damages, Gawker should be permitted to seek evidence that is likely to shed light on the reasonable value of the use at issue in this litigation. To the extent that Judge Campbell's prior ruling – which principally addressed plaintiff's tax returns, loan applications, and financial statements and which was issued before plaintiff had articulated his damages theories – might be read to preclude Gawker's discovery, that ruling should be clarified, and the requested discovery should be permitted. *See* Ex. 16 (providing that "inquiry into . . . financial records [and] names of tax preparers . . . of Terry Bollea . . . is prohibited, *absent further order of the court*") (emphasis added).

II. RECORDS RELATING TO PLAINTIFF'S PUBLIC IMAGE BEFORE AND AFTER THE GAWKER STORY ARE RELEVANT.

24. Gawker also seeks records from plaintiff's agents, publicists, business partners, and employers about his public image – both the image he sought to convey and the public's perception of him – before and after the Gawker Story. For example, Gawker seeks documents from plaintiff's agents reflecting, referring, or relating to plaintiff's "appearances in any Media. . . from January 1, 2011 to the present" and their "pitches or proposals" for him, his name, or his likeness to be used in advertisements, products, and commercial enterprises for the same time period. Requests No. 9, 11, and 12 to Young, Prince, and Prince Marketing.

25. Similarly, Gawker seeks documents from plaintiff's business partners, for instance, "sufficient to show what characteristics, traits, or other aspects of" him they "sought to market or promote by using his name, likeness and any of his trademarks" and for their communications with plaintiff and his representatives concerning marketing and the image they sought to convey. Requests No. 11 and 12 to Bay Harbor and Mallah; Request No. 12 to Tech Assets and Hardgrove.

26. And, Gawker would like to ask WWE for "market research referring or relating to Terry Bollea or Hulk Hogan from January 1, 2012 to the present, including, but not limited to, any analysis, assessment, or evaluation of the Hulk Hogan brand," as well as "[d]ocuments sufficient to show what characteristics, traits, or other aspects of Terry Bollea or Hulk Hogan you have sought to market or promote from January 1, 2012 to the present." Requests No. 6 and 7 to WWE.[7]

27. Documents concerning how plaintiff is perceived by the public and how he chooses to present himself to the public are relevant in at least three respects.

28. ***First***, such documents bear on plaintiff's claim for the "reasonable value of a publicly released sex tape featuring Hulk Hogan." As the *Restatement* explains, "the relative fame of the plaintiff" is "[a]mong the evidence relevant in determining the value of the [unauthorized] use." RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 49 cmt. d. Thus, documents showing plaintiff's relative fame, how plaintiff sought to portray himself, and how others view him are central in assessing the value of any tape featuring him.

29. ***Second***, to the extent that plaintiff benefited financially from the Gawker Story, that benefit represents a mitigation of plaintiff's alleged damages. Under black-letter legal principles, if a defendant's tort confers a benefit on the plaintiff, the value of that benefit can be a mitigation of damages. *See* RESTATEMENT (SECOND) OF TORTS § 920; *accord* 22 AM. JUR. 2D

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[7] A complete list of each of the subpoena requests seeking information about plaintiff's public image is attached hereto as Exhibit 18. This list provides the requests as modified by the parties and as offered to be further modified by Gawker following significant efforts to address plaintiff's objections. Plaintiff has objected to some of these requests to the extent that they seek financial records, based on his view that discovery of all financial records is barred by Judge Campbell's prior ruling. Even if that ruling circumscribed Gawker's ability to obtain information about the commercial value of Hulk Hogan's media and commercial appearances, other documents that are responsive to these requests are relevant for the reasons set forth in Section II of this Motion.

DAMAGES § 397 ("If the tortious activity injured an interest of either the plaintiff or his or her property and at the same time caused a special benefit to the same interest, the value of the benefit is considered in mitigation of damages, to the extent that such consideration is equitable. The resulting recovery is the net difference between the value of the injury and the value of the benefit.").

30. Here, plaintiff's damages may well have been mitigated in several ways:

- The Gawker Story might have increased the value of plaintiff's celebrity. Defendants seek to assess whether the relative value of his celebrity increased by comparing (a) the amount of money plaintiff was offered for his appearances and licenses, *see, e.g.*, *supra* at ¶¶ 15-17, and (b) the volume and quality of the "offers or invitations" he received to appear in advertisements, television shows, movies, and endorsements before and after the Gawker Story. *See* Requests No. 6, 8, 10 to Young, Prince, and Prince Marketing.
- The Gawker Story might have provided plaintiff with commercial opportunities that he would not otherwise have been offered. For example, after the Gawker Story, the prestigious WWE wrestling company signed him to a contract to promote the company and, in particular, the new network it was in the process of launching. *See* http://www.wrestlingnewsreport.com/report-details-on-hulk-hogans-current-wwe-contract-emerge/ (describing plaintiff's role with company); https://www.youtube.com/watch?v=l16A0RBhLCE (video of plaintiff promoting WWE and its network during wrestling broadcast that aired on February 24, 2014); *see also* Ex. 19 (Confidential Portion of Bollea Deposition Testimony Filed Under Seal) at 145:2-7 (describing nature of contract with WWE). Thus, requests for documents from 2012 to

the present relating to WWE's "consideration of whether to renew [its] relationship" with plaintiff and "any analysis, assessment, or evaluation of the Hulk Hogan brand" are reasonably calculated to lead to the discovery of admissible evidence about whether that opportunity could represent a mitigation of damages. Requests No. 4, 6 to WWE. Similarly, requests directed to determining why the Restaurant and Hostamania sought to use plaintiff's name and likeness after the Gawker Story are relevant to determining whether the Gawker Story had any role in plaintiff receiving those opportunities. *See, e.g.*, Request No. 7 to Tech Assets, Hardgrove, Bay Harbor, Mallah.

- Plaintiff and his business partners may well have sought to benefit from the notoriety provided by the Gawker Story. For example, several months after the Gawker Story was posted, plaintiff and his partner opened Hogan's Beach Restaurant, which plaintiff has described as "Hooters times ten" and a "logical extension of the Hogan brand," and the press has described as a "breastaurant." *See, e.g.*, R. Tepper, *Hulk Hogan To Open 'Breastaurant,' Hogan's Beach In Tampa Bay, Florida*. HUFFINGTON POST, Dec. 27, 2012, *available at* http://www.huffingtonpost.com/2012/12/27/hulk-hogan-breastaurant_n_2371869.html. Consequently, "market research" performed for the Restaurant is plainly relevant to assess whether plaintiff and his business partners sought to benefit from the recent media exposure plaintiff received in the wake of the Gawker post. *See, e.g.*, Request No. 10 to Bay Harbor and Mallah.

- And, plaintiff, his agents, and his business partners may well have sought to capitalize on the way the Gawker Story portrayed plaintiff by promoting his business ventures using a similar public image. For example, after the Gawker Story appeared,

Hostamania featured plaintiff in an advertisement that was a parody of a highly-sexualized music video in which Miley Cyrus appeared naked on a wrecking ball:

See Bollea Dep. at 179:13 – 180:10 (acknowledging appearance in advertisement spoofing a Miley Cyrus music video); *see also* Full Hulk Hogan Advertisement (available at https://www.youtube.com/watch?v=AgKsJ9uXfpc); Full Miley Cyrus Music Video (https://www.youtube.com/watch?v=My2FRPA3Gf8).

31. Gawker should be allowed to seek documents relating to "the image . . . Hostamania sought to convey through the advertisement" and "what characteristics, traits, or other aspects of" plaintiff "Hostamania sought to market or promote by using his name, likeness and any of his trademarks." Requests No. 10, 12 to Tech Assets and Hardgrove.

32. For this same reason, Gawker should be permitted to discover the "pitches or proposals" plaintiff's agents made for him to appear in advertisements, television shows, movies, and other commercial ventures, both before and after the Gawker Story, to determine whether the nature of those pitches and proposals changed and whether they sought to take advantage of the Gawker Story. *See* Requests No. 7, 9, 11 to Young, Prince, and Prince Marketing.

33. ***Third***, how plaintiff marketed himself before and after the Gawker Story is relevant to his claim for emotional distress damages. It is axiomatic that "[t]he intensity and the duration of the distress are factors to be considered in determining [the distress's] severity." RESTATEMENT (SECOND) OF TORTS § 46 cmt. j. Thus, plaintiff's claim that he was emotionally distressed would be undercut if he, his agents, and business partners viewed the notoriety he garnered from the Gawker Story as a business opportunity to be exploited. Likewise, his claim would be undermined by evidence showing that he sought to capitalize on the sexualized manner in which the Gawker Story portrayed him.

34. Indeed, in analogous circumstances, courts routinely consider plaintiffs' post-tort conduct in determining whether they actually suffered emotional distress, especially where, as here, the allegation of emotional distress is premised on the notion that plaintiff found defendant's conduct particularly offensive. For instance:

- In *Smith v. Cochran*, 182 F. App'x 854, 861 (10th Cir. 2006), a plaintiff claimed that she suffered emotional distress after the defendant allegedly raped her. A federal appeals court held that the trial court did not err by allowing the defendant to contest plaintiff's emotional distress claim by "introduc[ing] evidence that after the alleged rapes occurred [plaintiff] rubbed her breasts against a co-worker and danced while singing a song." *Id.* As the court explained, that evidence was relevant in considering "whether [plaintiff] suffered emotional distress." *Id.*

- In *Judd v. Rodman*, 105 F.3d 1339, 1343 (11th Cir. 1997), plaintiff claimed that she suffered emotional distress after the defendant infected her with herpes, contending that the infection affected her self-image. The United States Court of Appeals for the Eleventh Circuit ruled that the trial court did not err in allowing the defendant to

introduce evidence that plaintiff continued her employment "as a nude dancer" after the infection since that evidence "was probative as to damages for emotional distress because it suggested an absence of change in her body image." *Id.*; *see also Cason v. Baskin*, 159 Fla. 31, 40, 30 So. 2d 635, 640 (Fla. 1947) (noting in invasion of privacy case that although plaintiff "had been teased about the book" and "the publication of the book had upset her," she was not "entitled to any actual or compensatory damages" because there was no evidence of "loss of friends or respect in the community"); *Olson v. EG&G Idaho, Inc.*, 9 P.3d 1244, 1250 (Idaho 2000) (plaintiff's claim of emotional distress rebutted by showing that she continued to work and "seemed cheerful" after alleged tortious incident).

- In *Breitfeller v. Playboy Entm't Grp.*, 2007 WL 192245, at *5 n.16 (M.D. Fla. Jan. 23, 2007), two plaintiffs filed suit for the emotional distress allegedly caused by the defendant's conduct when they participated in a wet t-shirt contest. The court rejected that claim, however, noting that "[d]espite the extreme emotional distress Plaintiffs allegedly suffered as a result of their participation in the contest, Plaintiffs participated in another wet t-shirt contest in Daytona" the following year. *Id.*

35. In each of those cases, courts held that plaintiff's post-tort conduct was relevant to determining whether the plaintiff actually suffered compensable emotional distress. Here, Gawker seeks to discover how plaintiff acted following the publication of the Gawker Story and whether that conduct – and specifically his conduct marketing himself to the public – supports or undercuts his claim that he suffered emotional distress.

36. For each of these reasons, Gawker should be permitted to take discovery from plaintiff's agents, business partners, and employers about his public image, both as it existed and as they sought to craft it going forward.

III. THE OUTTAKES OF THE HOSTAMANIA ADVERTISEMENT ARE RELEVANT TO PLAINTIFF'S PRIVACY CLAIM.

37. Gawker seeks to request the outtakes from the advertisement showing plaintiff swinging on a wrecking ball in a feather boa and thong, mimicking a highly sexualized Miley Cyrus video. *See supra* at ¶ 5; Request No. 9 to Tech Assets and Mallah. That advertisement was created and filmed after the Gawker Story was published. *See* Bollea Dep. at 178:4-18.

38. At plaintiff's deposition, he explained the circumstances in which the advertisement was filmed, claiming that he took precautions to protect his privacy. *See* Ex. 19. at 181:4-15 (describing precautions taken).

39. Gawker should be permitted to find out whether, in the course of filming the advertisement, plaintiff – who was wearing a thong and whose bare buttocks appear in the ad – actually took those precautions to guard his privacy. That information is relevant to how closely plaintiff guards his privacy. *See, e.g.*, *Wynne v. Loyola Univ. of Chicago*, 318 Ill. App. 3d 443, 453, 741 N.E.2d 669, 677 (Ill. App. Ct. 2000) (evidence that plaintiff did not keep information about her infertility problems secret from colleagues and friends precluded private-facts action: "While these were certainly private facts, plaintiff, in disclosing them to her colleagues, did not keep them private."). And, it is relevant in assessing whether plaintiff actually suffered any emotional distress. *See Judd*, 105 F.3d at 1343 (fact that plaintiff continued to be a stripper undercut claim that she suffered emotional distress); *Breitfeller*, 2007 WL 192245, at *5 n.16 (fact that plaintiff participated in another wet t-shirt contest undercut her claim that she suffered emotional distress at an earlier wet t-shirt contest).

CERTIFICATION OF GOOD FAITH CONFERENCE

Pursuant to Florida Rule of Civil Procedure 1.380, movant's counsel certifies that they have, in good faith, conferred with counsel for plaintiff, including through multiple telephone conferences and email exchanges, in an effort to resolve the dispute without court action. While those efforts did result in Gawker withdrawing or altering many of the document requests that plaintiff found objectionable, thus substantially narrowing the parties' dispute, the parties were unable to resolve their dispute completely.

CONCLUSION

For the foregoing reasons, Gawker respectfully requests that the Court (a) grant this motion to overrule plaintiff's objections to its notices of intent to serve subpoenas, (b) grant Gawker's motions to issue commissions and/or letters rogatory, (c) deny plaintiff's motions for protective orders, (d) authorize Gawker to serve its proposed subpoenas as modified by agreement of the parties and as reflected in the attachments hereto, (e) issue the commissions and letters rogatory Gawker requested, and (f) grant such further relief as it deems appropriate.

Dated: August 21, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of August, 2014, I caused a true and correct copy of the foregoing to be served electronically upon the following counsel of record at their respective email addresses via the Florida Courts E-Filing Portal:

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